

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's) IB Docket No. 95-41
Regulatory Policies Governing)
Domestic Fixed Satellites and)
Separate International Satellite)
Systems)

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COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits the following comments with respect to the Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding. PanAmSat whole-heartedly supports the Commission's goal of increasing competition in both the international and domestic satellite markets. Indeed, PanAmSat, in the context of a number of pending applications that presented the issues raised in the Notice, suggested that the Commission initiate the instant rule making proceeding to examine the continued usefulness of maintaining distinctions between domestic and international service.¹

As discussed below, in eliminating the regulatory distinctions between domestic and international satellite providers and, thereby, changing the competitive groundrules, the Commission must create the conditions for truly competitive domestic and international satellite markets. In particular, the Commission must come to grips with the highly concentrated nature of the U.S. domestic satellite market, where only two operators — Hughes Communications and GE Americom — have 24 in-orbit satellites, which constitutes the lion's share of the available orbital locations.

¹ See submissions of PanAmSat in connection with the following: Application of Hughes for Modification of its Authority to Construct, Launch and Operate a Hybrid Domestic Communications Satellite, FCC File Nos. 33-DSS-ML-94 and CSS-94-014-MP/MC (submitted April 25, 1994); Application of Hughes for Authority to Construct, Launch and Operate One Separate International Fixed Communications Satellite, FCC File Nos. 47-DSS-P/LA-94 and CSS-94-018 (submitted July 15, 1994); Application of Columbia, FCC File Nos. CSS-94-019, 46 DSS-ML-92(2), CSS-94-020, 46-DSS-ML-94(2) (submitted July 15, 1994); Motion for Declaratory Ruling of Direct Broadcasting Satellite Corporation, FCC File No. DBS-88-08/94-13DR (submitted September 8, 1994).

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This domestic "duopoly" requires, first, that the Commission take steps to make the domestic market more competitive, which the proposals set out in the Notice will not accomplish because of the difficulty that U.S. separate systems and foreign satellite operators have in serving the United States from their present orbital locations. Second, the Commission also should ensure that U.S. domestic operators are not allowed to leverage their dominant positions in the U.S. market and compete unfairly in the international services market. Therefore, the Commission, as part of this proceeding, should assure that U.S. separate satellite systems have immediate access to orbital locations in the U.S. domestic arc, which runs between, approximately, 60° W.L. and 135° W.L. If there are not sufficient locations available to satisfy the demand from U.S. separate satellite systems, domestic satellite operators each should be "capped" at a reasonable number of orbital locations in the domestic arc.

I. WHILE THE MARKET FOR INTERNATIONAL SATELLITE SERVICES IS COMPETITIVE, THE MARKET FOR DOMESTIC SATELLITE SERVICES IS HIGHLY CONCENTRATED.

The market for international satellite services is highly competitive. PanAmSat, Orion, Columbia, U.S. domestic satellites (transborder), Intelsat, Hispasat, Eutelsat, Arabsat, Astra, Apstar, AsiaSat, Palapa and other regional and domestic satellite systems all presently provide international satellite services, resulting in an abundance of capacity and competitive rates for all services but switched services, as to which Intelsat, Comsat, and other Intelsat signatories still enjoy a virtual monopoly. Allowing domestic satellite licensees to provide international satellite services will result in even more competition in the international sphere.

In stark contrast, the domestic satellite market, consisting only of Hughes, GE Americom, and AT&T, is highly concentrated. Through a decade-long process of acquisition, Western Union, SBS, ASC, and GTE Spacenet, and the "renewal expectation" for their orbital locations, all disappeared into Hughes Communications and GE Americom. These two operators now control some 24 out of 30 domestic in-orbit satellites,² with one other satellite operator — AT&T — able

² Hughes alone has an existing satellite or a reservation in at least eleven orbital locations in the domestic arc, an application pending at the Commission requesting six orbital assignments for 17 satellites for its Spaceway System and, through AMSC (of which Hughes is the largest shareholder), a reservation for three additional locations. Moreover, Hughes's affiliate DirecTV holds authorizations for DBS satellites at multiple orbital locations.

to provide only limited competition from three in-orbit satellites, two of which (Telstar 302 and 303) are inclined orbit satellites.

The effects of this domestic satellite duopoly are shown dramatically by the current severe shortage of domestic satellite capacity,³ a shortage that has resulted in sharply increased rates for domestic C-band and Ku-band transponder capacity. While the monthly rate for a transponder on Galaxy 7 was \$70,000-75,000 before the height of the transponder shortage, that rate reached approximately \$125,000 by February 1994.⁴ The shortage is so severe that the few domestic transponders still available are now being auctioned to satellite users, with minimum opening bids set at \$140,000 per month per transponder.⁵

While the C-band shortage is particularly severe, there is also a serious shortage of Ku-band capacity, as reflected in the recent announcement by Hughes to charge a flat fee of \$1,000 per hour for C- and Ku-band occasional use service.⁶ Industry observers said the move, made possible by the domestic capacity shortage, represents a doubling, and in some cases more than a doubling, of previous prices.⁷ Price gouging by domestic satellite providers has priced educational and non-profit satellite users out of the market, prompting the National Education Telecommunications Organization and EDSAT to warn that "many, many small independent education providers [will] go dark and out of business."⁸

Accordingly, given the dearth of competitive service providers in the U.S. domestic satellite market, the introduction of new competition in that market must be an overriding objective of this proceeding.

II. ELIMINATION OF THE DISTINCTION BETWEEN DOMESTIC SATELLITES AND SEPARATE SYSTEMS, WITHOUT THE ADOPTION OF OTHER MEASURES, WILL RESULT IN COMPETITION ONLY IN THE INTERNATIONAL MARKET.

The Commission notes that, unless elimination of the transborder policy is accompanied by elimination of the "ancillary" service policy, domestic satellite

³ See, e.g., Communications Daily, March 8, 1995, at 7; Space News, November 7-13, 1994, at 1 and 20.

⁴ Satellite News, February 21, 1994.

⁵ Communications Daily, May 23, 1995, at 8.

⁶ Broadcasting & Cable, April 24, 1995, at 47.

⁷ Id. at 47-48.

⁸ Telecommunications Report, March 20, 1995, at 37.

providers would have an unfair advantage over separate system licensees.⁹ In this regard, the Commission proposes to permit separate system licensees to offer domestic satellite services which, as implied in the Notice, will enable separate system licensees and domestic satellite providers to compete in each other's market on an equal basis.

This premise is faulty. Separate system licensees, as the Commission has recognized,¹⁰ cannot offer domestic satellite services effectively from their present orbital positions. Moreover, because the three current domestic satellite providers have virtually all of the scarce domestic positions, separate system licensees are precluded from competing meaningfully in the domestic market.

While PanAmSat supports allowing foreign-licensed satellite systems — both FSS and DBS — to offer domestic satellite services, provided that comparable market opportunities exist for U.S.-satellite licensees in such operators' respective home markets, the foreign-licensed operators also are not in a position to compete effectively in the U.S. domestic market. Only six non-U.S. satellites are located in the 60° W.L. and 135° W.L. satellite arc¹¹ (in comparison to the 30 domestic satellites now in orbit).¹² Furthermore, these foreign satellites do not have service footprints that cover the continental United States ("CONUS") and, therefore, cannot offer an effective competitive alternative to the domestic satellite providers or relieve the existing critical shortage of domestic satellite capacity.

Domestic satellite licensees, however, if permitted by the Commission, easily and quickly can provide north-south international satellite services from their present orbital positions in the U.S. domestic arc in direct competition with PanAmSat and other satellite operators serving Latin America. Indeed, Hughes has on file with the Commission two pending applications to provide direct-to-home satellite services in Latin America from its 95° W.L. orbital location.

While the Commission suggests that the policy changes proposed in the Notice are not likely to result in full competition between in-orbit domestic and international systems in the near term, Hughes' applications demonstrate that such suggestion is only half true: separate system licensees cannot compete effectively in

⁹ Notice at ¶ 20.

¹⁰ Id. at ¶ 22.

¹¹ See The 1995 World Satellite Directory, 17th Annual Edition, at 27.

¹² Notice at ¶ 31.

the U.S. domestic market, but domestic satellite operators are fully capable of competing directly with separate system licensees in the international market.¹³ While it may be difficult to convert in-orbit satellites to north-south international service, Hughes and GE Americom have numerous "replacement" satellites under construction, and applications pending for more. As Hughes's two pending applications demonstrate, all — or portions of all — of these satellites can be shifted to international service.

Domestic satellite providers also are capable of offering from a single satellite international satellite services interconnected with the CONUS and, from a number of prime locations, full fifty state coverage. Once the rules eliminating the distinction between domestic and international service are adopted, separate system operators will have limited opportunity to offer such services from a single satellite, because there are currently few available positions in the domestic arc. This fact already has been made painfully clear to PanAmSat, as a number of international satellite users have elected to use Hughes' Galaxy IV satellite rather than PanAmSat's PAS-2 satellite, or other separate system satellites, because Galaxy IV offers full U.S. coverage.¹⁴

III. THE COMMISSION'S RULES SHOULD PROMOTE FAIR COMPETITION.

Competition cannot be the one-way street that would result if the Commission did nothing more in this proceeding than eliminate the regulatory distinction between domestic and international satellite authorizations. As Chairman Hundt noted just days ago, the Commission's job is to write fair rules of competition and to protect consumers from monopolies.¹⁵ With this objective in mind, PanAmSat urges the Commission to write rules in this proceeding that maximize competition in the satellite services market, as a whole, without

¹³ Worse still, Hughes, a dominant player in nearly every facet of the satellite industry, can leverage its substantial market power in the domestic satellite market into the international market by bundling domestic and international services on the same satellite and by cross-subsidizing its international rates with excess profits derived from the highly-concentrated, capacity strapped domestic market. To counter these anticompetitive activities, if domestic satellite providers are permitted to offer international satellite services, the Commission should take steps to ensure that Hughes does not exercise its substantial market power to gain an unfair advantage over separate system providers, including for example requiring Hughes to observe strict structural separation requirements.

¹⁴ Communications Daily, May 10, 1995, at 4.

¹⁵ FCC News Release, "Statement of FCC Chairman Reed E. Hundt in Response to the Progress and Freedom Foundation's News Conference," May 30, 1995.

providing one class of service providers with an unfair competitive advantage *vis-a-vis* the other or contributing to the creation of monopoly service providers.

To ensure that both domestic satellite and separate system licensees have comparable opportunities to compete in each other's markets, that domestic satellite users have access to a diversity of service providers, and that the current critical shortage of domestic satellite capacity is ameliorated, the Commission must make domestic orbital positions available in the near term to separate system licensees, including at least one fifty-state position. This approach is fully consistent with the Commission's policy of attempting "to afford new entrants, when possible, at least one initial orbital location in the portion of the orbital arc that allows them to provide maximum quality service to all 50 states."¹⁶

If there are not sufficient orbital locations available to accomplish this objective, the Commission should cap each domestic satellite licensee at a reasonable number of orbital locations in the domestic arc. Moreover, the Commission should adopt a "transition" period regarding the rules to be adopted in this proceeding. During the transition period, domestic satellite licensees who wish to use all or part of their satellites for international, as opposed to domestic and transborder services, should be required first to seek the Commission's explicit authorization to do so. This would give the Commission the opportunity to make a determination that such change in satellite usage is in the public interest, taking into account the supply of domestic C- band and Ku- band capacity, regulatory parity with U.S. separate system licensees (including whether such parity actually translates into comparable market access), whether there is unfair tying of, or cross-subsidization between, domestic and international services, and similar public interest factors.

Such a requirement advances two important public interests. First, it would ensure that domestic satellite providers are unable to gain an unfair competitive advantage *vis-a-vis* separate system operators before separate system licensees are able to compete in the domestic market. Second, it would create a mechanism by which the Commission could ensure that the needs of domestic users are met before capacity is diverted to the international market.¹⁷ Such a mechanism is essential if

¹⁶ Memorandum Opinion and Order, 3 FCC Rcd 6972 (1988) at ¶ 3.

¹⁷ In this regard, the requirement is consistent with the rationale underlying the Commission's "Transponder Sales" policy. Domestic Fixed-Satellite Transponders Sales, 90 F.C.C.2d at 1255(1982). While PanAmSat supports the elimination of that policy to the extent that it

the Commission is to avoid the types of severe capacity shortages afflicting domestic users today.

Simply put, this is the only way separate system licensees can be given a meaningful opportunity to compete with domestic satellite providers. Failure to make these positions available will result in one-sided competition, defeating the Commission's objective of creating fair competition and allowing the duopoly in the domestic satellite market to grow increasingly strong and to leverage that dominance into the international market.

IV. USE OF THE DOMESTIC SATELLITE FINANCIAL QUALIFICATION STANDARD WILL ALLOW ONLY LARGE ENTITIES TO OPERATE NEW SATELLITES AND, THEREFORE, WILL DISCOURAGE THE PROVISION OF INNOVATIVE SERVICES AND EXACERBATE THE DOMESTIC SATELLITE DUOPOLY.

PanAmSat opposes the Commission's proposal to apply the domestic satellite full financial showing to all system operators.¹⁸ PanAmSat is a company that soon will operate a multi-satellite global system. Yet PanAmSat and very few other substantial companies could satisfy the domestic satellite financial showing, particularly when compared to Hughes or GE Americom, who with their parent companies, are among the largest industrial concerns in the world. AT&T, the only other active domestic satellite licensee, does not need a parent company to achieve that distinction. These industrial giants are the only satellite operators who are capable of meeting the domestic satellite standard.

Accordingly, rather than promoting competition — the stated objective of the instant rulemaking — application of the domestic satellite standard will stifle it, thereby discouraging the provision of innovative services and encouraging the creation of monopolistic conditions.

The Notice states that, because all U.S.-licensed fixed satellites will be permitted to provide domestic service, all applicants for such satellites should be able to obtain financial commitments from lenders based on the justified expectation of revenues from the provision of such service.¹⁹ As discussed above, however, U.S. separate system providers cannot provide effective domestic service

provides all satellite operators with the flexibility needed to tailor their service offerings to particular customer requirements (see Section V(B), *infra.*), the Commission still must retain the ability to ensure that sufficient capacity exists for domestic users.

¹⁸ Notice at ¶ 26.

¹⁹ Id. at ¶ 29.

from their current orbital positions and, in light of the absence of available domestic orbital positions, will not be able to provide such service in the future unless the Commission takes affirmative steps to make such positions available to them.

In light of the foregoing, PanAmSat urges the Commission to apply the separate system showing to all U.S.-licensed fixed satellites. Any other approach will preclude separate system licensees from launching new satellites, enhance the unfair competitive advantages domestic satellite licensees already possess by virtue of their lion's share of the domestic arc, and markedly reduce competition in the satellite market as a whole.

V. OTHER MATTERS.

A. Comsat Should Not Be Permitted To Offer Domestic Service Using Intelsat Capacity.

The Notice, while reaching no tentative conclusion, invites comment on whether Comsat should be permitted to provide domestic service using Intelsat capacity.²⁰ PanAmSat strongly opposes granting Comsat such permission. The abolition of Intelsat's special privileges and immunities is now under review. Until that process is completed, it would be premature to consider allowing Comsat to use Intelsat capacity for domestic service.

In any event, unless the Commission exercises jurisdiction over Intelsat's space segment, including Intelsat pricing structures, there is too great a potential for Comsat to undercut its competitors in the domestic market by cross-subsidizing between its competitive and monopoly services. While reciprocity can serve as an effective means to ensure that foreign satellite systems are acting in the public interest, without "piercing the veil" between Intelsat and Comsat, no comparable mechanism exists to prevent Comsat from acting in an anti-competitive manner.

B. Satellite Operators Should Be Free To Elect Whether To Provide Service On A Common Carrier Or Non-Common Carrier Basis.

PanAmSat supports the Commission's tentative conclusion to allow licensees and applicants to elect whether to provide service on a common carrier or non-common carrier basis.²¹ There is no legal compulsion for any U.S. licensees to serve

²⁰ Id. at ¶ 39.

²¹ Id. at ¶ 33.

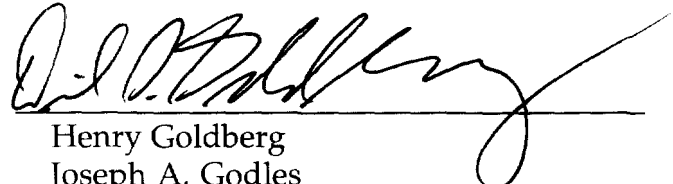
the public indifferently and, because the FSS satellite service is characterized by long-term contractual offerings of technically and operationally distinct portions of a satellite, it is unlikely that licensees will hold themselves out indifferently. Operators that desire to serve the public indiscriminately, however, should be free to do so on a common carrier basis.

CONCLUSION

PanAmSat supports increased competition in the market for satellite services. As the Commission has recognized, however, competition must be fair. Accordingly, while PanAmSat strongly supports the elimination of existing regulatory distinctions between international and domestic satellite operators, to ensure that such action actually promotes, rather than stifles, competition, the Commission must first provide separate system licensees access to domestic orbital positions. This approach will enable both international and domestic operators to compete effectively in each other's markets which, in turn, will create the conditions necessary for the realization of the objectives of this rulemaking: increased satellite capacity for users, competitive rates and the development of new and innovative satellite services.

Respectfully submitted,

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